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# U.S. Transportation Merger Policy: Evolution, Current Status, and Antitrust Considerations

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# U.S. Transportation Merger Policy: Evolution, Current Status, and Antitrust Considerations

## **Abstract**

The structure and behavior of the U.S. surface freight transportation industries are undergoing dramatic change as a result of the decrease in federal government economic regulation of these industries. In particular, legislative and administrative changes in the approach to regulating intramodal and intermodal mergers have helped facilitate a restructuring of the U.S. rail system and the establishment of railroad-owned multimodal transportation firms. Additionally, the exemption of trucking mergers from Interstate Commerce Commission (ICC) regulation may lead to larger combinations in that industry.

## **Disciplines**

Other Business

## **Comments**

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result of the constraints placed on it under the conditions where it is actually proposed (strong economies of scope over a large network):

... [T]he only economically justifiable procedure is either to segregate out all users who do not use only the facilities in question, or to widen the group of movements under consideration further to include all those that utilize the other common facilities. This process may have to be continued until the group encompasses all movements that are confined to a separable portion of the rail network. In some cases, *such a group may turn out to be sufficiently large so as to render the test impractical.* [emphasis added] (51).

(51) W.J. Baumol and R.D. Willig, "Pricing Issues", p. 43.

## NOTE DI RICERCA RESEARCH NOTES

### U.S. TRANSPORTATION MERGER POLICY: EVOLUTION, CURRENT STATUS, AND ANTITRUST CONSIDERATIONS (\*)

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#### I. INTRODUCTION

The structure and behavior of the U.S. surface freight transportation industries are undergoing dramatic change as a result of the decrease in federal government economic regulation of these industries. In particular, legislative and administrative changes in the approach to regulating intramodal and intermodal mergers have helped facilitate a restructuring of the U.S. rail system and the establishment of railroad-owned multimodal transportation firms. Additionally, the exemption of trucking mergers from Interstate Commerce Commission (ICC) regulation may lead to larger combinations in that industry.

The current policies and standards governing mergers in the surface freight transportation industries differ markedly from those previously in effect. One purpose of this paper is to bring the reader up to date by reviewing the current merger regulation policies and standards and their evolution. The second purpose of the paper is to provide a brief discussion of the merger guidelines employed by the U.S. Department of Justice (DOJ), the agency charged with enforcing the federal antitrust laws, and their relevancy to and likely impact upon transportation mergers. Toward these ends the remainder of the paper is divided into three sections: the following section deals with the regulation of rail and trucking mergers; section III addresses the regulation of rail-barge and rail-truck mergers; Section IV discusses the role and influence of the DOJ merger guidelines in transportation mergers.

(\*) Final version: August 1985.

## II. INTRAMODAL MERGERS

The ICC's regulation of rail and trucking mergers generally necessitates an assessment of the public benefits and harms expected of a proposed merger. Specifically, the ICC has weighed the projected economic benefits against the potential anticompetitive effects. Before embarking upon an analysis of the ICC's regulation of intramodal mergers, a discussion of the potential economic benefits of such mergers is warranted. Since the economic benefits of rail and trucking mergers have been thoroughly discussed elsewhere, they will only be summarily treated here (1).

One of the key problems confronting the railroad industry and contributing to its financial woes is the existence of a significant amount of excess route capacity (2). Rail mergers are viewed as an effective means of reducing excess route capacity. "Parallel" mergers (i.e., mergers among railroads serving many of the same cities with routes of nearly equal distance) appear to have the greatest potential for reducing excess trackage through either the abandonment or the downgrading of redundant track. For instance, Gallamore discovered that substantial savings in the maintenance of ways and structures, transportation, and maintenance of equipment expense categories were predicted for the parallel mergers (3). Both Conant and the Task Force on Railroad Productivity noted that the projected cost savings of past parallel mergers expressed as a percentage of total operating expenses more often than not greatly exceeded those of nonparallel mergers (4).

Another advantage presumed to be characteristic primarily of parallel mergers is the achievement of greater efficiency through improved routing. The merged railroad is expected to route traffic over the superior line (e.g., the less circuitous line or the line with the superior grade). Evidently, the merged railroad would downgrade rather than abandon parallel lines in order to con-

(1) For more in-depth discussions of the various economic benefits of rail and trucking mergers, the reader is referred to the following: Robert Gallamore, *Railroad Mergers: Cost, Competition and the Future Organization of the American Railroad Industry*, Harvard University Ph.D. dissertation, 1968, pp. 290-358; James E. Lane, *The Public Interest in Railroad Consolidation*, Indiana University doctoral dissertation, 1963, pp. 252-266; *Improving Railroad Productivity*, Final Report of the Task Force on Railroad Productivity to the National Commission on Productivity and the Council of Economic Advisors, Washington, D.C., pp. 234-244; James C. Johnson, *Trucking Mergers: A Regulatory Viewpoint*, Lexington Books, Lexington, Massachusetts, 1973, pp. 58-80.

(2) Michael Conant, *Railroad Mergers and Abandonments*, University of California Press, Berkeley, California, 1964, pp. 1-24 and Theodore E. Keeler, "Railroad Costs, Returns to Scale, and Excess Capacity", *The Review of Economics and Statistics*, May 1974, pp. 201-208.

(3) R. Gallamore, *op. cit.*, p. 69.

(4) M. Conant, *op. cit.*, p. 88; and, *Improving Railroad Productivity*, p. 251.

tinue operating the superior segments between various cities, and segments of the downgraded track would be maintained at relatively high standards.

Though parallel mergers appear to hold the greater potential for cost savings, they also tend to be the more objectionable type of merger because of their anticompetitive nature. Conversely, "end-to-end" mergers (i.e., mergers among railroads that interchange a substantial volume of traffic) are less objectionable on competitive grounds, but the forecasted benefits of such mergers are also less (5). Elimination of traffic interlining will reduce clerical costs and switching costs and could potentially simplify billing, rate-making and revenue divisions by bringing the traffic movement under one management. The end-to-end mergers appear to offer greater service benefits than parallel mergers. They permit more run-through trains (i.e., yards are by-passed), better car tracing service, better utilization of rail cars and, thus, a better car supply for the shippers, and liability for loss and damage is more easily determined since fewer carriers are involved in the freight movement (6). Shippers prefer single-carrier to multi-carrier service for these reasons. One study determined that, for 1974, ninety-five percent of the traffic in markets served by single-carrier service was captured by those single-carrier routes, vis-a-vis traffic tendered to multi-carrier routes (7). A corollary of this last fact which has been largely ignored in the literature is the effect an end-to-end merger might have on competition. If the end-to-end merger creates the only single-carrier service for certain markets, the traffic diversion from competing multi-carrier routes could reduce traffic on those routes so drastically that those lines are either downgraded or abandoned. Conversely, if the end-to-end merger occurs in markets already served by single carrier service, the merger would increase the competitiveness of those markets. (In the former case, one might expect "defensive" mergers among the multi-carrier routes' railroads or trackage agreements or other coordinating arrangements which could permit continued competition). Generally, however, end-to-end mergers are believed to have less of a negative effect on competition.

Other potential economic benefits often cited for both parallel and end-to-end mergers include traffic diversification, consolidation of yards and terminal facilities, and traffic growth resulting from diversion of traffic from other transport modes and from other railroads (a benefit for the merged railroad but not necessarily for the financial well-being of the entire rail system). Traffic diversification is beneficial to the extent that it keeps revenue levels fairly constant by balancing the peaks and troughs of different commodity flows.

(5) M. Conant, *op. cit.*, p. 88; *Improving Railroad Productivity*, p. 251; R. Gallamore, *op. cit.*, pp. 65-68.

(6) It has been alleged that, because of the low per diem charges assessed, it is often more advantageous for railroads to hold other carriers' cars rather than investing in new cars. Also, since the cars no longer are interlined, the utilization of cars increases, which means that at any given time, more cars would be available (assuming a given volume of traffic).

For an industry such as the railroads with a large magnitude of fixed costs, it is imperative that revenues do not decline. In many situations, yards and terminal facilities may be consolidated in order to achieve lower per unit costs of switching and loading cars. And, finally, given the existence of excess route capacity and the large magnitude of fixed costs and joint and common variable costs, traffic growth permits the railroads to realize their economies of density (i.e., economies of utilization) (8).

The expected economic benefits of trucking mergers are analogous to those of rail mergers in many respects. As will be discussed later, the major benefits cited by the ICC in its evaluations of proposed motor carrier mergers were service improvements, though operating efficiency gains were also viewed as important considerations. However, Corsi and Boisjoly found no significant long-run gains in operating efficiency or financial performance in their study of 19 motor carrier mergers consummated during 1973 and 1974 (9). They concluded that "any significant benefits from merger activities are most likely achieved in the short run from the intracity operations of motor carriers through reduced pick-up and delivery expenses, terminal costs, and administrative overhead" (10).

The primary incentive for motor carriers to merge prior to regulatory reform appeared to be the desire to increase the size of the route structure (11). ICC regulation of entry into new markets was very restrictive, particularly so for those carriers involved in less-than-truckload (LTL) operations (12). As a result, expansion through internal growth was difficult to achieve. Merger often proved to be a more acceptable and quicker means to attaining new operating authority as it left the number of carriers in the market unchanged. Though the removal or easing of regulatory barriers to market entry permits internal expansion, merging may still be the preferred approach to market penetration since the purchased carrier has the facilities, equipment and shipper contacts already in place.

With this general background in intramodal merger benefits, the next section turns to the analysis of ICC regulation of railroad mergers.

(7) Alain L. Kornhauser, "Elementary Theory of Traffic Diversions: A Tool for Analysis of Restructured Railroad Networks", *Transportation Research Record*, 1979, p. 58.

(8) T.E. Keeler, *op. cit.*, p. 208.

(9) Thomas M. Corsi and Russell Boisjoly, "The Long-Run Effects of Merger in the Motor Carrier Industry: The Implications of Deregulation", *ICC Practitioners' Journal*, Vol. 49, No. 3, March-April, 1982, pp. 282-289.

(10) *Ibid.*, p. 286.

(11) J.C. Johnson, *op. cit.*, pp. 158-159; and Grant M. Davis, John E. Dillard, Jr., and William G. Middleton, "Growth and Structural Changes in Class One Motor Carriers: An Empirical Analysis", *ICC Practitioners' Journal*, Vol. 48, No. 5, July-August 1981, pp. 552-559.

(12) Russel P. Boisjoly and Thomas M. Corsi, "An Identification of the Distinguishing Characteristics of Acquired Trucking Firms", *ICC Practitioners' Journal*, Vol. 48, No. 5, July-August 1981, pp. 571-572.

## A. ICC REGULATION OF RAILROAD MERGERS

### *Merger Legislation Prior to 1976*

Although federal economic regulation of the railroad industry began with the Interstate Commerce Act in 1887, the ICC was not granted complete authority over railroad mergers and consolidations until 1920 (the ICC was given the power to reject but not approve mergers by the Clayton Act of 1914). In response to the deteriorated state of the railroad industry, the Transportation Act of 1920 included several pro-railroad provisions including the Congressional mandate that the ICC develop a "master plan" for rail unifications. The objective of this consolidation plan was the creation of a limited number of railroad systems with approximately equal earnings ability and the preservation of competition among the systems as fully as possible. In December of 1929 the ICC issued its master plan which proposed nineteen consolidated rail systems (13). Only proposed rail mergers consistent with the plan were to be approved by the ICC.

As a result of the dearth of merger activity following the master plan, Congress amended Section 5(2) of the Interstate Commerce Act with the passage of the Transportation Act of 1940 (14). The rail consolidation plan was abandoned, and voluntary rail mergers were encouraged. The ICC was to approve mergers which were found to be "consistent with the public interest". Section 5(2) (c) (recodified as Section 11344(b) (1)) delineated the considerations to be given weight by the ICC in its merger decisions:

- 1) The effect of the proposed transaction upon adequate transportation service to the public;
- 2) The effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction;
- 3) The total fixed charges resulting from the proposed transaction, and
- 4) The interest of the affected carrier employees.

Additionally, the ICC was authorized to impose conditions upon an approved merger in order to eliminate or alleviate those aspects of the merger which are not consistent with the public interest. The ICC has made considerable use of his authority over the years as will be discussed.

The legislation enacted in 1940 was the last dealing with railroad mergers until the Railroad Revitalization and Regulatory Reform Act of 1976 (the

(13) James C. Johnson and Terry C. Whiteside, "Professor Ripley Revisited: A Current Analysis of Railroad Mergers", *ICC Practitioner's Journal*, Vol. 42, No. 4, May-June 1975, p. 422.

(14) *Ibid.*, pp. 429-431.

4R Act). As the attitude toward railroad merger regulation changed significantly with the 4R Act, a brief discussion of the ICC's implementation of the statutory guidelines prior to 1976 is necessary for a comparison of pre- and post-regulatory reform merger regulation.

*Implementation of the Section 5(2) (c) Merger Guidelines: 1940-1976*

The change from an ICC-prescribed merger plan to total reliance upon railroad-initiated mergers created a more favorable merger environment as evidenced by the subsequent flurry of merger activity. The ICC approved about 100 mergers between 1940 and 1960, and approved 40 of the 59 merger applications received from 1956 to 1971 (15).

A staff study by the ICC's Bureau of Transport Economics and Statistics in 1962 traced the ICC's interpretations and applications of the Section 5(2) (c) merger guidelines in 12 mergers approved between 1948 and 1960. The study reported that, typically, the ICC utilized three separate but related criteria to evaluate the adequacy of transport services: the economy of service (i.e., cost reductions and impact upon rates), the efficiency of service (i.e., improvement in line-haul operations and impact upon quality of service to shippers), and the appropriate provisions and best use of transport facilities (16). The impact of the merger upon total fixed charges was initially dismissed by the study since "the application of this criterion is not usually a major problem" (17). The interest of affected employees was generally protected via the imposition of labor protective conditions upon the merged carrier in accordance with the requirements detailed in Section 5(2) (f) (now Section 11347) of the Interstate Commerce Act (18).

The effect upon the public interest of the inclusion or omission of other railroads proved to be a difficult criterion to implement. The ICC's primary concern here was with the merger's impact upon the future ability of other railroads to compete. The study noted that the ICC had difficulty determining the extent to which diverted traffic would prove injurious to other railroads over the long run and how this would affect their service offerings and the overall rail competitive picture (19).

Though the impact upon competition was not specifically identified as a required public interest consideration in the 1940 legislation, each merger case

(15) *Ibid*, p. 431.

(16) *Railroad Consolidations and the Public Interest — A Preliminary Examination*, Staff Study by Bureau of Transport Economics and Statistics, Interstate Commerce Commission, Washington, D.C., March 1962, pp. 43-45.

(17) *Ibid*, p. 47.

(18) *Ibid*, pp. 47-50.

(19) *Ibid*, pp. 46-47.

reviewed in the 1962 study was scrutinized by the ICC on the basis of the impacts upon adequate service and intramodal competition. The impact upon intermodal competition began to appear in the later cases covered by the study, but the ICC had made little attempt to evaluate the overall competitive results with respect to intermodal competition (20). A review of 18 ICC rail merger decisions between 1948 and 1974 by Johnson and Whiteside confirmed the importance of competition as a public interest criterion (21).

It should be noted at this time that while mergers in most nonregulated industries are subject to review and approval by the DOJ and/or the Federal Trade Commission (FTC), railroad mergers approved by the ICC are relieved from the operation of the antitrust laws by Section 5(11) of the Interstate Commerce Act (now Section 11341). However, as will be discussed later, the DOJ provides input on the competitive effects of merger in the ICC merger evaluation process, and the ICC has recently begun utilizing the DOJ's merger guidelines in its assessment of proposed rail mergers.

In essence, the ICC attempted to weigh the anticipated public benefits of a merger against the anticipated public harms, and frequently imposed conditions upon the merged railroad to alleviate the expected harmful effects. Traffic protective conditions were often employed in attempts to lessen anticompetitive effects. In a 1950 merger decision the ICC established a set of standard traffic and routing conditions (i.e., the DT&I Conditions) which were routinely applied to all subsequent mergers. The DT&I Conditions required the merged carrier to "maintain and keep open all routes and channels of trade via existing junctions and gateways" (22). The net effect of these conditions was to prevent the rerouting of traffic previously moving over the lines of the merging railroads. The ICC also interpreted the DT&I Conditions as requiring rate equalization as the ICC acknowledged in a later ruling:

A consolidated carrier was generally prohibited from maintaining rates on its new single-line routings, resulting from the consolidation, below the rates on any competing joint-line routes in which it participated. We feared that if a single-line rate was lowered without securing the concurrence of all connecting carriers in lowering the corresponding joint-line rates, the "commercial closing" of certain routes or gateways would occur and competition would be reduced" (23).

The ICC's attempts to assuage the undesirable impacts of mergers with protective conditions allegedly prevented the merged carriers from realizing

(20) *Ibid*, p. 47.

(21) J.C. Johnson and T.C. Whiteside, *op. cit.*, pp. 432-452.

(22) Ex Parte No. 282 (Sub. No. 5), *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112, 1982, pp. 112-114.

(23) *Ibid*, p. 113.

many of the projected benefits of merger (24). The ICC was also criticized for its inconsistent application of the statutory public interest considerations and its lengthy delays in rendering decisions (25). As a result of these criticisms and a rekindled desire of Congress to improve the health of the railroad industry, new merger guidelines were issued in 1976.

#### *Merger Guideline Within the 4R Act of 1976*

The primary objective of the 4R Act was to improve the financial and economic performance of the railroad industry by reducing and modifying the existing economic regulations. The statutory changes in merger regulation were "intended to encourage mergers, consolidations, and joint use of facilities that tend to rationalize and improve the Nation's rail system" (26).

The 4R Act included an alternative procedure, called the Section 5(3) or "expedited" procedure, for merger petitions which was available to railroads until January 1, 1982. Section 5(3) required the ICC to render its decision within a specified time frame (31 months) and provided a more extensive set of public interest criteria:

- (1) the needs of rail transportation;
- (2) the effect on rail and intermodal competition;
- (3) the environmental impact;
- (4) the cost of facility rehabilitation;
- (5) the rationalization of the system;
- (6) the impact on shippers, consumers, and railroad employees;
- (7) the effect on communities; and
- (8) whether the transaction will improve rail service.

(24) Two studies of post-merger performances by Robert Gallamore (*Railroad Mergers: Cost, Competition, and the Future Organization of the American Railroad Industry*, Harvard University, Ph.D. dissertation, 1968) and the Midwest Rail Service Study (*Retrospective Study of Selected Railroad Mergers*, Ernst & Whinney, September 1979), found that merged railroads rarely achieved the projected benefits. One major explanation for these disappointing performances involves the ICC's protective conditions.

(25) The interested reader is referred to the following publication for a more detailed discussion of these criticisms: Michael R. Crum, "A Critique of and Recommendations for the ICC's Evaluation of Proposed Railroad Mergers", *ICC Practitioners' Journal*, Vol. 51, No. 4, May-June 1984, pp. 368-372.

(26) S. Rep. No. 94-499, 94th Congress, 1st Sess. 20 (1975), Sections 101 (a) (2) and (b) (2), U.S. Code Cong. & Ad. News 1976, pp. 13, 34.

Interestingly, no rail merger petitions were filed under this alternative procedure. However, the merger guidelines contained in Section 5(3) were reflected in the Staggers Rail Act of 1980 merger provisions and the ICC's general statement of merger policy issued in 1982.

#### *The Staggers Rail Act of 1980*

With the expiration of Section 5(3), the criteria outlined in the Transportation Act of 1940 were once again the only available statutory guidelines. These guidelines were amended by Section 228(a) (2) of the Staggers Rail Act of 1980 (Staggers Act) which added a fifth public interest consideration: "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region". The Staggers Act also established time limits similar to those of the 4R Act for the ICC's merger decision process.

In addition to the explicit references to merger regulation, the Staggers Act provided a declaration of national rail transportation policy (27) and several significant changes in railroad regulation which should be considered in rail merger decisions. The key objectives identified in the statement of policy include: the relation of ICC regulation and more reliance upon the competitive forces of the marketplace, the continuation of competition where it exists and the development of competition wherever possible, and the promotion of a financially healthy railroad industry. Both the 4R Act and the Staggers Act are viewed as pro-railroad legislation.

In response to the changes in regulatory policy mandated by Congress in the Staggers Act, the ICC issued two rulings in 1982 which significantly altered the regulation of rail mergers.

#### *Removal of DT&I Conditions and the ICC's Current Rail Merger Policy*

In recognition of the emphasis in the Staggers Act upon rate flexibility and routing freedom, the ICC abolished its DT&I Conditions (28). The ICC concluded that the DT&I Conditions are neither consistent with the Staggers Act's intent to foster sound rate and service relationships based on the cost of service and the competitive pressures of the marketplace nor necessary to protect the public's interest in attaining economic efficiency in the railroad industry (29). However, the ICC did not rule out the imposition of "specific, narrowly focused traffic protective conditions if they meet the standards set

(27) Title I, Section 101 (a) of S. 1946, Staggers Rail Act of 1980 (P.L. 96-448).

(28) Ex Parte No. 282 (Sub. No. 5).

(29) *Ibid*, pp. 121-126.

forth in the Merger Policy Statement", (30) and indicated that it would exercise its authority to establish through routes and joint rates if anticompetitive abuses occur in the absence of the DT&I Conditions (31).

Ex Parte No. 282 (Sub-No. 3), *Railroad Consolidation Procedures* (decided February 19, 1982) contains the ICC's general statement of policy for merger or control of at least two class I railroads. The primary concerns expressed in the merger policy statement are: the effect on the operating efficiency of the total rail system, the effect on inter- and intramodal competition, and the continuation of essential transportation services by the merging railroads and other affected carriers (32). With respect to the competitive impacts of a proposed merger the ICC noted:

...the Commission does not favor consolidations that substantially reduce the transport alternatives available to shippers unless there are substantial and demonstrable benefits to the transaction that cannot be achieved in a less anticompetitive fashion. Our analysis of the competitive impacts of a consolidation is especially critical in light of the congressionally mandated commitment to give railroads greater freedom to price without regulatory interference (33).

Additionally, the merger policy statement addressed the use of protective conditions other than traffic conditions. Section 1111.1 (d) and (e) reveal the ICC's reluctance to impose conditions to protect affected carriers or to include affected carriers in the merger. Such conditions would be imposed only to enable shippers to receive adequate service and where the ability of the consolidated carrier to obtain the benefits of improved operating efficiency would not be jeopardized. Section 1111.2(f) commits the ICC to providing only the mandated statutory protection for labor and no more unless evidence can be provided indicating the need for more stringent protection because of unusual circumstances.

The next section provides a brief review of the ICC's decisions in post-4R Act merger applications.

#### *Implementation of the Statutory Merger Guidelines: Post-1976*

Since the 4R Act, the ICC has adopted a strong pro-merger stance. In a comprehensive study of rail merger impacts, legislation and policy the ICC's Rail Service Planning Office (RSPO) recommended that the ICC issue a policy statement encouraging rail restructuring through the merger process. The RSPO advocated end-to-end (i.e., vertical) mergers in particular as having the

(30) *Ibid.*, p. 133.

(31) *Ibid.*, p. 128.

(32) Section 1111.b (a) (2), p. 101.

(33) Section 1111.1 (a), p. 91.

potential for greater long-term advantages accompanied by fewer risks than parallel (i.e., horizontal) mergers (34). The RSPO viewed merging as the most effective approach to restructuring the U.S. rail network given the general inability of the industry over the years to coordinate their operations voluntarily by other means (e.g., trackage rights, joint use of facilities and pooling) (35).

The ICC's merger policy statement and implementation of the statutory merger guidelines closely reflect the RSPO's recommendations. The railroads, cognizant of the receptiveness of the ICC, have zealously embraced the merger strategy. Between 1980 and 1982 four primarily end-to-end consolidations representing 55 percent of all rail freight revenues were approved. The ICC is currently evaluating the proposed merger between two parallel western railroads, the Southern Pacific and the Santa Fe, which, if approved, would create the nation's third largest railroad measured by miles of track). The sale of government-owned Conrail to the Norfolk Southern is also under review. If these two consolidations occur, the five largest railroads would account for approximately 83% of all U.S. rail freight revenue. Additionally, several consolidations among smaller, regional railroads have also taken place, and more are likely to occur.

A review of the ICC's decisions in the four major consolidations reveals that the most heavily weighted criteria in the evaluations of the mergers were the impacts upon competition and essential services, and the ICC seemed reluctant to impose conditions other than to preserve these two service elements (36).

The ICC considers service to be essential "if there is a sufficient public need for the service and adequate alternative transportation is not available". Smith concludes that the ICC, in essence, has substituted the essential services standard for the "adequacy of transportation" statutory guideline (37). The emphasis is on the merger's impact upon the essential services offered by the non-applicant railroads (38). Thus far, the ICC has utilized a theoretical or conceptual approach to determining the likely impact upon essential services rather than a factual or formulable approach (39). The result has been a stringent application of essential services guidelines which makes it difficult for both

(34) *Rail Merger Study Final Report*, Rail Services Planning Office, Interstate Commerce Commission, Washington, D.C., February 1, 1978, pp. 1-3.

(35) *Ibid.*, p. 21.

(36) Daniel Smith, "The Evolution of Rail Merger Policy", *Proceedings of the Twenty-Fourth Annual Meeting of the Transportation Research Forum*, Vol. XXIV, Number 1, 1983, pp. 558-565; and, G. Paul Moates, "Evolving Standards for Rail Consolidation Cases Since Enactment of the 4R Act," *Eastern Transportation Law Seminar*, 1981, pp. 165-170; and Curtis M. Grimm, "Public Interest Evaluation of Recent Railroad Mergers", *Eastern Transportation Law Seminar*, 1981, pp. 171-176.

(37) D. Smith, *op. cit.*, p. 562.

(38) G.P. Moates, *op. cit.*, p. 165.

(39) *Ibid.*, p. 170.



applicants and protestants to support their positions (40). Unlike its merger evaluations of the 1950's and 1960's, the ICC's analyses of the competitive effects of recent mergers have been conducted in a manner consistent with that applied by the DOJ to the manufacturing sector (41). The ICC noted in its Union Pacific-Missouri Pacific-Western Pacific (UP-MP-WP) merger decision:

We will continue to examine consolidation under the terms of the Interstate Commerce Act where competition is but one factor, albeit an important one, in determining the public interest. Nonetheless, the principles of the antitrust laws, specifically of section 7 of the Clayton Act, and sections 1 and 2 of the Sherman Act provide substantial guidance in our assessment of the competitive impact of rail consolidations under the Interstate Commerce Act (42).

Grimm criticizes the ICC for its misapplication of market share measures in the UP-MP-WP merger. Specifically, he argues that the ICC utilized a methodology designed to measure parallel (horizontal) impact for its analysis of the merger's end-to-end (vertical) impacts. Consequently, Grimm concludes that the ICC has underemphasized the vertical foreclosure impacts from end-to-end mergers (43).

## B. ICC REGULATION OF TRUCKING MERGERS

### *Merger Legislation Prior to 1980*

Whereas the ICC had no authority over railroad mergers the first 33 years it regulated the industry, trucking merger regulation commenced with the Motor Carrier Act of 1935, the inaugural economic regulation legislation for the trucking industry. Section 213(a) (1) granted the ICC authority to approve trucking mergers found to be consistent with the public interest and to prescribe conditions and terms for approved mergers (44). However, no public interest guidelines or considerations were provided in the act.

(40) D. Smith, *op. cit.*, p. 565.

(41) Curtis M. Grimm, "An Evaluation of Economic Issues in the UP-MP-WP Railroad Merger", *The Logistics and Transportation Review*, Volume 20, Number 3, 1984, pp. 245-247.

(42) Finance Docket No. 30000, Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company — Control — Missouri Pacific Corporation and Missouri Pacific Railroad Company, Interstate Commerce Commission, (served October 20, 1982), p. 503.

(43) C.M. Grimm, *op. cit.*, 1984, pp. 247-254.

(44) Transactions involving 20 vehicles or less were subject to less stringent regulation than mergers involving larger carriers. The Transportation Act of 1940 continued this policy: large truck mergers were subject to Section 5 regulation while small mergers were governed by Section 212 (b). In 1965 the size criterion for small mergers changed to less than \$300,000 gross operating revenue for the merging firms for the 12 month period prior to the merger.

With the passage of the Transportation Act of 1940 Section 213 was repealed and trucking mergers became subject to Section 5 of Part I of the Interstate Commerce Act. As a result, the Section 5(2) (c) public interest considerations employed by the ICC in proposed railroad consolidations were also applicable to mergers among trucking firms. Additionally, as with rail mergers, approved trucking mergers were exempted from the antitrust laws by Section 5(11).

The next section summarizes the major findings of two studies which investigated the ICC's implementation of the trucking merger legislation prior to the changes brought about by the regulatory reform legislation of 1980.

### *Implementation of the Section 5(2) (c) Merger Guidelines: 1940-1980*

Motor carrier firms like the railroads have exhibited a propensity to use mergers as a means to growth and expansion. The number of regulated inter-city motor carriers decreased on the average of 375 per year during the period from 1940-1969 with the great majority of the decrease due to mergers among small trucking firms. From 1957-1967 the ICC approved 467 unifications involving the 100 largest regulated interstate truck firms. However, only 14 of these mergers were between carriers in the top one hundred (45).

Two studies of the ICC's policy toward trucking mergers involving large carriers were published in the mid-1970's. In order to gauge the key factors in the ICC's evaluation of and general policy toward trucking mergers, Johnson reviewed 450 ICC decisions selected randomly from the 2340 Section 5 cases decided between 1938 and 1972. Further, he identified and added to his descriptive study 17 "key" cases not included in his random sample (46). Corsi utilized stepwise multiple discriminant analysis to identify the subset of variables which best discriminated between mergers approved and denied by the ICC. His sample consisted of 27 merger cases decided during the time period 1965-1972 (47). Though not the specific focus of either study, the results and conclusions of these studies provide the basis for an assessment of the ICC's implementation of the statutory merger guidelines.

The ICC's evaluation of the trucking mergers' impacts upon adequate transportation service seemed to parallel the criteria employed in railroad merger decisions. Johnson found improved service (especially faster service, more and better timed schedules, decreased loss and damage, better available equipment, and faster tracing) to be the most widely acknowledged reason given by the

(45) J.C. Johnson, *op. cit.*, pp. 55-56.

(46) *Ibid*, pp. 60-64.

(47) Thomas M. Corsi, "The Policy of the ICC in Trucking Merger, Control, and Acquisition of Certificate Cases, 1965-1972", *ICC Practitioners' Journal*, Vol. 43, 1976, pp. 24-38.

ICC for authorizing trucking unifications (48). Also, the revival of failing trucking firms and expected operating economies (from increased load factors, decreased circuitous routes, reduced pick-up and delivery expenses, reduced loss and damage claims, reduced maintenance costs, consolidated terminals and other facilities, better management, and overall decreased labor costs) were important public interest benefits enumerated by the ICC in its merger decisions (49).

The ICC's policy concerning adversely affected carrier employees in trucking mergers differed significantly from that in railroad mergers. Section 5(2) (f) of the Interstate Commerce Act required the ICC to provide protective conditions in approved rail mergers which leave rail employees no worse off for four years after merger. Such conditions were not required in trucking mergers, and the ICC frequently awarded no protection or compensation for adversely affected trucking employees. In those few cases where the ICC intervened on behalf of trucking labor, the compensation or protection granted was usually substantially less than that required in rail mergers (50).

As in the regulation of rail mergers, trucking merger impacts upon intermodal and intramodal competition were scrutinized carefully by the ICC. Johnson noted that the ICC generally applied two criteria in deciding if a consolidation was consistent with the public interest: the expected public benefits arising from a merger and the effect upon competing carriers (51). The impact upon intermodal competition played a significant role in the ICC's early decisions, but virtually disappeared as a consideration in later cases.

The P.I.E. —Keeshin merger case in 1950 was the last "key" case in which the impact of a trucking merger upon competing railroads was considered significant. The ICC denied this proposed transcontinental trucking merger on the grounds that it would divert a substantial volume of traffic from competing railroads and thus jeopardize the railroads' ability to meet those needs of commerce and the national defense which could not be met by other modes alone (52). Shortly after the P.I.E. —Keeshin decision, the ICC reversed itself in two "key" decisions rendered in 1954 and 1960. Essentially, the ICC concluded that motor carrier unifications would not significantly increase the basic financial difficulties of the railroad industry, and that the growth and improved service performance of the trucking industry should not be restricted to protect the railroads (53). Thereafter, the intermodal competitive issue was largely ignored in trucking merger cases.

In determining the impact of a proposed trucking merger on intramodal competition the ICC generally drew a distinction between mergers offering a

(48) J.C. Johnson, *op. cit.*, p. 65.

(49) *Ibid.*, pp. 68-80.

(50) *Ibid.*, pp. 76-78.

(51) *Ibid.*, p. 87.

(52) *Ibid.*, pp. 82-85.

(53) *Ibid.*, pp. 85-87.

"new" service, analogous to the attainment of new geographic operating authority, and an "improved" service, such as that arising from the merging of interlining carriers. Typically, the ICC ruled that protesting carriers had no legitimate reason to contest mergers producing an improved service. However, in new service cases the ICC weighed the benefits to the shipping public against the adverse effects on the protesting carriers (54). Corsi's study supports the contentions that the impact on competing motor carriers was weighed heavily by the ICC as he discovered the number of protesting carriers (above a critical mass) and their projected magnitude of revenue losses to be significant factors in the ICC's decisions (55). Johnson concurred and noted that the ICC had traditionally held that existing carriers who had made large investments to improve their service to the shipping public should be protected from additional competition as long as the existing service was adequate and efficient (56). The ICC was clearly more concerned with mergers' impacts upon competitors than with the impacts upon competition.

Johnson concluded that the ICC generally favored trucking mergers, especially those of an end-to-end type where prior interlining existed (57). This conclusion was based solely on his analysis and interpretation of ICC merger case law as the ICC had no stated trucking merger policy prior to 1980. With the advent of regulatory reform the ICC decided to greatly reduce its regulation of trucking mergers as the next section reveals.

#### *Merger Legislation 1980 and Post-1980*

Though the Motor Carrier Act of 1980 did not alter the public interest considerations for trucking mergers, the Staggers Act contained an amendment to section 11344 of the Interstate Commerce Act which addressed transactions not involving control or merger of at least two class I railroads. Section 228 (d) of the Staggers Act mandated approval of such mergers unless:

- (1) As a result of the transaction, there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, and
- (2) The anticompetitive aspects of the transactions outweigh the public interest in meeting significant transportation needs.

The ICC initially concluded that Section 228 (d) referred only to rail mergers not involving at least two class I carriers. However, passage of the Bus Regulatory Reform Act of 1982 led the ICC to conclude that Congress intended

(54) *Ibid.*, pp. 87-88.

(55) T.M. Corsi, *op. cit.*, pp. 35-36.

(56) J.C. Johnson, *op. cit.*, pp. 92-94.

(57) *Ibid.*, p. 162.

Section 228 (d) to apply to motor carriers of property (58). Also, Section 21 (b) of the Bus Regulatory Reform Act gave the ICC authority to exempt trucking mergers from regulation if: (1) the ICC determined that such regulation is not necessary to carry out national transportation policy, and (2) either the transaction is of limited scope or merger regulation is not needed to protect shippers from the abuse of market power. As a result, the ICC recently issued a ruling which greatly reduces its role in proposed trucking mergers.

### *ICC's Current Trucking Merger Policy*

The ICC had contemplated reducing its regulation of trucking mergers prior to the passage of the Motor Carrier Act of 1980 (59). However, the first ICC ruling providing for decreased regulation did not occur until November of 1982 (60). The ICC decided to utilize its new authority to exempt trucking mergers from the provisions of section 11343 provided the merger displayed no potential anti-competitive effects. The ICC had to issue a decision analyzing the transaction regardless of whether the proceeding was opposed. Of the 800 petitions for exemption filed subsequent to this ruling, only one was contested by the DOJ on anti-competitive grounds (61). Consequently, the ICC went one step further in removing itself from the regulation of trucking mergers by granting a class exemption for all trucking mergers in Ex Parte No. 55 (Sub — No. 57), decided November 21, 1984.

Ex Parte No. 55 (Sub — No. 57) provides an automatic exemption for all proposed trucking mergers unless the ICC receives a written complaint within 30 days concerning the potential anticompetitive effects or adverse labor effects of the merger. Upon receipt of any such nonfrivolous complaint, the proposed merger will be subjected to a detailed analysis. In assessing the potential for a merged trucking firm's abuse of market power, the ICC noted:

Although the class exemption procedures will facilitate motor carrier consolidations, it is unlikely that undesirable market concen-

(58) In 49 CFR Ch. X, Vol. 47, No. 219, [Ex Parte No. 55 (Sub-53)], *Motor Carrier Consolidation Procedures; General Policy Statement*, November 12, 1982, pp. 51132-51133, the ICC noted that by reinstating the pre-Staggers Act merger criteria upon the bus industry but not the trucking industry, Congress had intended Section 228 (d) to apply to trucking mergers.

(59) In Ex Parte No. 55 (Sub.No. 38 F) *Antitrust and Competitive Factors in Motor Carrier Finance Cases*, Decided January 11, 1980, the ICC proposed lessening the filing requirements for "less significant transactions" (i.e., those where combined gross annual revenues of applicants did not exceed the median revenue figure for the largest 100 trucking firms). This proposal was never implemented.

(60) Ex Parte No. 400 (Sub.No. 1), *Procedures for Handling Exemptions Filed by Motor Carriers of Property Under 49 U.S.C. 11343*, Effective November 19, 1982.

(61) Ex Parte No. 55 (Sub.No. 57), *Exemption of Certain Transactions Under 49 U.S.C. 11343*, Decided November 21, 1984, p. 6.

tration and competitive abuses will result. The presence of relatively low economic barriers to entry (combined with a corresponding reduction in the many regulatory barriers) assures that individual firms will not be able to raise prices or reduce the level of service to supra-competitive levels for an extended period of time. Such anticompetitive behavior would quickly result in the growth of private carriage and the entry of other for-hire competitors offering more market responsive price and service options. DOJ also recognizes that ease of entry is an important consideration in whether to challenge a merger (62).

The ICC's current attitude toward trucking merger regulation is a very permissive one. The ICC's proclivity for favoring mergers as a means of promoting competition was evident shortly after the Motor Carrier Act of 1980 and well before its recent policy statements. In December of 1980 the ICC announced its approval of the merger of two trucking firms which were direct competitors in 27 city-pairs and which created the eighth largest trucking firm in the nation (63). The ICC noted that the combined firm would have only 2% of the national market and that competition in the trucking industry would be increased due to the creation of a firm financially stronger than its components (64). The formal statements of policy merely acknowledge the ICC's receptiveness to trucking mergers.

### III. INTERMODAL MERGERS

The pre-1980 policy on common ownership and thus mergers creating integrated "transportation companies" has been viewed as negative and restrictive (65). The general policy has been to confine transport ownership to modal boundaries. This policy has some interesting and important dimensions. First, except for railroad control of motor carriers and barge lines, the Interstate Commerce Act contains no specific provisions dealing with intermodal acquisitions (66). All other cross-modal mergers except rail-barge and rail-truck are handled under the general consolidation provisions of the Interstate Commerce

(62) *Ibid.*

(63) Denis Breen, "Trucking Mergers and Public Policy", Presentation at a conference on "Competition in Transportation Sector — Impact of Antitrust Law and Competition Policy on the Airline, Trucking, Railroad and Maritime Industries" sponsored by the Federal Bar Association and the American Bar Association, Washington, D.C. May 18, 1984.

(64) James C. Johnson, "Going, Going, Gone! — The ICC's Regulation of Trucking Mergers", *ICC Practitioners' Journal*, May-June 1984, Vol. 51, No. 4, p. 392.

(65) Byron Nupp, "Regulatory Standards in Common Ownership in Transportation", *ICC Practitioners' Journal*, Vol. 34, November-December 1966, p. 21 and Donald Harper, *Transportation*, Englewood Cliffs, N.J., Prentice-Hall, Inc., 1978, pp. 544.

(66) D. Harper, *op. cit.*, p. 545.

Act. Second, there has been a historic desire to treat cross-modal combinations in a more restrictive way than intramodal combinations (67). This policy of placing additional restrictions on rail control of barge lines and motor carriers was established when the railroads dominated the transportation market and the water carrier and motor carrier industries were in their infancies.

Implicit in this restrictive policy has been the general reluctance of both the Congress and the ICC to trade-off the potential public benefits for the possible harmful effects of either rail-barge or rail-truck mergers. Although several different types of arguments have been used to oppose the development of integrated transportation companies, the primary argument concerns the potential anticompetitive effects of such mergers, (e.g., predatory pricing used to drive out the independent operators) (68). Benefits of intermodal consolidations include: reduction of duplicative expenses and economies of scope (resulting from the horizontal nature of such mergers), improved and more cost effective intermodal transportation service (resulting from the improved economic and physical coordination inherent in an intermodal move controlled by one carrier), improved pricing of intermodal services (resulting from the ability to construct and price an entire intermodal move), and increased capability for railroads to offer new marketing opportunities for shippers (69). Included in the above benefits are the usual arguments of the benefits of "one-stop shopping" such as reduced transactions costs. It is also argued that an integrated company would more likely route traffic to gain the maximum cost and service advantages from each mode under its control given it would maintain the traffic under any routing (70). With respect to private benefits, such acquisitions can increase a railroad's profits by extending its market territory that is normally limited by its rail route system. In addition, particularly in the case of rail-controlled trucking operations, the railroad can increase its profits by substituting motor carrier service for parallel, inefficient rail service (e.g., service on light density branch lines).

Proving one transportation expert wrong, who predicted several years ago that the usual ICC position on rail-barge and rail-truck mergers would not change unless Congress specifically directed the ICC to do so, the ICC recently has dropped its reluctance to make the trade-off between the benefits and costs of intermodal mergers (71). By its decisions in recent rulemakings

(67) B. Nupp, *op. cit.*, p. 39.

(68) See Robert C. Lieb, "Intermodal Ownership: Experience and Evaluation", *ICC Practitioners' Journal*, Vol. 38, July-August 1971 for a discussion of the other arguments in opposition to integrated ownership.

(69) G. Paul Moates, "Transport Industry Concentration and Cross-Ownership — The Future of Intermodal Competition", *Eastern Transportation Law Seminar*, 1984, pp. 74-75.

(70) D. Harper, *op. cit.*, p. 544.

(71) *Ibid*, p. 545.

and two important cases involving rail-barge and rail-truck merger transactions, the ICC has made it easier for railroads to acquire barge lines and motor carriers.

With this brief review of the intermodal merger benefits, the next section provides an analysis of rail-barge mergers.

#### A. ICC REGULATION OF RAIL-BARGE MERGERS

##### *Rail-Barge Merger Legislation*

The ICC was granted authority over rail-barge mergers in the Panama Canal Act of 1912, eight years before it received complete authority over railroad mergers. Congress passed the Panama Canal Act to maximize the use of the soon to be completed Panama Canal, to promote intercarrier competition and to protect water transportation from rail domination (72). The act amended then Section 5 of the Interstate Commerce Act to make it unlawful for any railroad or pipeline to own, lease, operate or control any water carrier or any vessel carrying freight or passengers through the Panama Canal or elsewhere with which such railroad or pipeline does or may compete. The ICC was permitted to allow a railroad to continue control of a competing water carrier purchased before 1912 if the water carrier did not operate through the Panama Canal and if the water carrier was operated in the public interest advantageously to interstate commerce and allowed competition, without reduction, on the route by water under consideration (73).

The Transportation Act of 1940, the last legislation dealing with rail-barge mergers, authorized the ICC to approve new acquisitions by railroads of competing water carrier not using the Panama Canal subject to these same standards (74).

Subsequent legislative attempts to repeal or modify the provisions of the Panama Canal Act have been unsuccessful. Despite apparent attempts by the railroad industry to have the provisions stricken in the Transportation Act of 1958, Congress refused to repeal or even modify any of the provisions. A year later Senate Bill 1355, which would have permitted railroads to engage in water carrier operations on the inland waterway system, died in committee. Twenty years later Congress rejected the ICC's recommendation to repeal the

(72) Samuel P. Delisi, "Coordinated Freight Transportation Service: Legal and Regulatory Aspects — Part II", *ICC Practitioners' Journal*, Vol. 34, May-June 1967, p. 556.

(73) See Interstate Commerce Commission Decision, Finance Docket No. 30125, Water Transport Association for Declaratory Order-American Commercial Lines Voting Trust (served July 1, 1983), page 7 for a discussion of this issue.

(74) See *Ibid*, p. 7 and G. Paul Moates, *op. cit.*, 1984, p. 70 for differing views of the nature of this amendment.

Panama Canal Act. The Panama Canal Act also survived the sweeping changes made in the regulation of railroads by the Staggers Act and the less ambitious changes in the 4R Act. Most recently, The Transportation Improvement Act of 1983 (Senate Bill 48), which would have, *inter alia*, repealed the Panama Canal Act, died in committee (75).

#### *ICC Administration of Rail-Barge Merger Provisions*

The Panama Canal Act provisions, now housed in section 11321 in the recodified Interstate Commerce Act, are both prohibitive and permissive. They prohibit railroads without exception from acquiring water carriers operated through the Panama Canal. On the other hand, paragraph (b) of Section 11321 authorizes the ICC to permit a railroad to own a water carrier with which it does or may compete for traffic if the transaction will still allow that water carrier to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water route in question. Although clearly giving the ICC the responsibility to determine whether a railroad competes or may compete and when a merger meets the public interest and competitive criteria, Section 11321 does not provide any standards or guidelines to assist the ICC in making such determinations. It should also be noted that the rail-barge mergers are also subject to sections 11343 and 11344 of the Interstate Commerce Act, which contain the general consolidation, merger, and acquisition of control provisions. The important question in determining the impact of the Panama Canal Act on the amount of rail-barge mergers is, how has the ICC interpreted these somewhat vague standards.

**ICC Interpretation — Prior to 1980** The initial cases involved railroads requesting permission to continue their control over water carriers. Although in an early important case, the Lake Line Applications under Panama Canal Act, the ICC denied continued control, many other requests for continued control were approved (76). These cases did not involve the inland waters other than the Great Lakes. In another series of cases, the ICC approved the continued rail control of ferry services or car float or lighterage services in major ports, services which the ICC generally viewed as being embraced by the term "railroad" rather than "water carrier" (77). The ICC had few cases and never authorized a railroad's acquisition of a competing barge line

(75) See Richard A. Zellner and Smith R. Brittingham, III, "Common Rail-Barge Ownership: The Destruction of Effective Competition", *Eastern Transportation Law Seminar*, 1984, p. 81 and Brief of Petitioner, Water Transport Association, Water Transport Association vs. CSX Corporation, Interstate Commerce Commission and United States of America, D.C. Court of Appeals, no date, pp. 23-25 for a discussion of these legislative attempts to repeal or modify the Panama Canal Act.

(76) S.P. Delisi, *op. cit.*, p. 558.

(77) B. Nupp, *op. cit.*, p. 24.

operating on the inland waters other than the Great Lakes (78). Several rail-barge mergers were approved upon the finding that the railroad and barge line did not compete. As of 1978, only two barge lines were controlled by the railroads (79).

A review of the case law indicates that the ICC has not developed firm standards for rail-barge mergers. In the 1972 Southern Railway Application case the ICC did delineate certain guidelines used in past cases for determining if a railroad and the water carrier "do or may compete": (1) if the railroad and water carrier serve two or more common points, and (2) if they actively compete for the same traffic. The ICC also noted a railroad may be found not to be competitive with its affiliated water carrier, despite serving two or more common points, because of the nature of the traffic, service differences, and/or rate differences between the railroad and water carriers, or extreme circuitous routing of either the rail route or the water route (80).

The guidelines developed by the ICC to determine if the transaction will still allow the water carrier to be operated in the public interest advantageously focus on whether the merger would enhance intermodal rail-barge moves, and whether the water carrier would be maintained as a viable entity by the railroad (81). The ICC recently stated the public interest test is closely related to the competition test — if the water carrier continues to operate as an active competitor, its operations will be considered to be in the public interest and advantageous to interstate commerce (82).

To determine if a transaction will still allow competition without reduction on the water route in question, the ICC has traditionally adopted a three-part approach to competitive analysis, examining the reduction in competition between the target water carrier and the acquiring railroad, the competition between the consolidated rail-barge entity and other water carriers, and the intra-barge competition among the non-included water carriers. A finding that the railroad will dominate the acquired water carrier, that the rail-barge combination will have substantial economic and financial advantages over non-integrated water carriers, and that the service now being provided by the non-included water carriers is adequate has been used to support a finding that the merger will lead to reduction in competition on the water route in question (83).

(78) R.A. Zellner and S.R. Brittingham, III, *op. cit.*, p. 82.

(79) *Multimodal Ownership Patterns: Selected Financial and Operating Data*, Office of Regulatory Policy, Office of the Secretary, U.S. Department of Transportation, January 12, 1981, p. 6.

(80) Southern Railway Co. Section 5 (15) Application, 342 I.C.C. 416, 430-432 (1972).

(81) Illinois Central Railroad Company et al — Control, ETC — John I. Hay Company, 317 I.C.C., 39, 53.

(82) Interstate Commerce Commission Decision, Finance Docket No. 30300, CSX Corporation — Control — American Commercial Lines, Inc. (served September, 1984), p. 16.

(83) Illinois Central Railroad Company, p. 54.

As noted above, rail-barge mergers are also subject to Sections 11343 and 11344 of the Interstate Commerce Act. Because the criteria in Section 11344 bars a rail-barge merger transaction only if the transaction would result in substantial lessening of competition and if the anticompetitive effects outweigh the public benefits, the standards for approval are less stringent under Section 11344 than Section 11321 and thus usually not controlling (84).

*ICC Interpretation — Post. 1980* Since 1980, the date of significant regulatory reform in transportation regulation in the United States, the ICC has had only one rail-barge merger transaction to review under Section 11321—the Panama Canal Act. However, the ICC decision in the case, involving the third largest railroad in the United States, the CSX Corporation (CSX), and either the first or second largest barge line, the American Commercial Barge Lines, Inc. (ACBL), has been viewed by some as a dramatic shift in ICC policy and an emasculation of the Panama Canal Act. (85). In June of 1983 the CSX acquired the Texas Gas Corporation which owned American Commercial Line (ACL) which, in turn, wholly owned the American Commercial Barge Lines, Inc. (ACBL). The CSX placed the shares of ACL in an independent voting trust pending ICC approval of its application, filed in November of 1983, to acquire the barge line under Sections 11321 and 11344. After extensive hearings and oral argument, the ICC issued its unanimous decision approving the consolidation in September of 1984 (86). A Petition for Review of the ICC order is pending in the Court of Appeals for the Sixth Circuit with a mid-1985 decision anticipated (87).

A review of the ICC decision and the arguments used by the applicant and protestants provides an insight into the possible impact of this decision on future rail-barge mergers. The CSX argued that four basic benefits would result from the merger, which it viewed primarily as being a vertical integration: (1) operational savings; (2) more efficient joint ratemaking; (3) an expanded market perspective; and (4) reduction or elimination of transaction costs (88). CSX further argued that though CSX and ACBL do compete in one sense, they do not compete in the narrower sense that is the focus of Section 11321 (a) (89). In addition, it argued that the transaction would not reduce competition on the water route in question primarily due to the competitive nature of and the ease of entry into the barge industry (90).

(84) Interstate Commerce Commission, Decision, Finance Docket No. 30300, p. 17.

(85) R.A. Zellner and S.R. Brittingham, III, *op. cit.*, p. 83.

(86) Interstate Commerce Commission, Decision, Finance Docket No. 30300.

(87) G.P. Moates, *op. cit.*, 1984, p. 72.

(88) John Snow, Verified Statement, Finance Docket No. 30300, CSX Corporation — Control — American Commercial Lines, Inc., November 4, 1983, p. 19.

(89) Interstate Commerce Commission, Decision, Finance Docket No. 30300, Appendix C.

(90) Application of CSX Corporation and American Commercial Lines, Inc., Finance Docket No. 30300, CSX Corporation — Control — American Commercial Lines, Inc., Vol. 1, November 1, 1983, pp. 52-53.

The U.S. Department of Transportation and a number of states actively participated in the proceedings and generally supported the application. On the other hand, the U.S. Department of Agriculture, the Water Transport Association (representing most of the barge lines), the National Coal Association, several utilities, and several states, primarily coal producing states, actively opposed the application. The opposition arguments focused upon the potential anticompetitive effects of the merger and the high level of intermodal movements under the present regime of separate ownership. Interestingly the DOJ did not file comments but did file a post-hearing review (91).

The ICC found that the CSX and ACBL did compete under section 11321 (a) and thus had to rule on whether the transaction passed the "reduction of competition" and "public interest" tests of Section 11321 (b). After examining the data and arguments with respect to the level of concentration and ease of entry into the barge industry, and the various arguments concerning market foreclosure and evasion of ICC rate regulation, the ICC decided that the CSX-ACBL operation would be effectively constrained from successfully engaging in any type of anticompetitive activity and thus would not reduce competition on the water route in question (92).

Three aspects of the decision with respect to anticompetitive issues merit highlighting. First, the ICC established a new standard by rejecting its holding in the John L. Hay case in 1962 which essentially associated a finding of harm to the acquired water carrier or to one of its competitors, defined as a change in competitive status, with a finding of reduced competition on the involved water route. The position adopted in this decision is that harm to competitors does not imply harm to competition (93). Second, the ICC made wide use of the 1984 DOJ merger guidelines in its analysis of the proposed merger. For example, it cited the DOJ merger guidelines to support its position that an increase in market concentration is not dispositive of the competition issue. The ICC stated that a consolidation is not anticompetitive unless it creates or enhances market power which is defined as the ability of one or more firms to profitably maintain prices above competitive levels for a significant period of time. Its decision with respect to the delineation of the relevant market and its use of ease of entry in this case were also supported by the DOJ guidelines (94). Third, the ICC decided to retain jurisdiction for five years to oversee and consider possible anticompetitive effects of the merger (95).

(91) Interstate Commerce Commission, Decision, Finance Docket No. 30300, Appendix C.

(92) *Ibid*, pp. 27-45.

(93) *Ibid*, p. 19.

(94) *Ibid*, pp. 23 and 36.

(95) *Ibid*, p. 45.



Based upon the projected operating savings from the consolidation and the single system service available to the shipper ("one-stop" shopping), the ICC also found that transaction would allow ACBL to be operated in the public interest advantageously to interstate commerce (96). The ICC additionally approved the merger under the less stringent provisions of section 11344 (d) which also involved an analysis of the competitive effects of the merger but was focused on the regional effects (97).

It is not clear what impact this decision will have on the amount of rail-barge mergers in the future. Although some have argued the ICC decision on the CSX-ACBL case nullified the Panama Canal Act, no other rail-barge mergers have been proposed. Other railroads may be waiting for the Court of Appeals decision or view the decision as simply reflecting the pro-deregulation ICC membership at the time of the decision. It is clear, however, that the ICC was influenced by the 1984 DOJ guidelines, which are pro-merger. In addition, the ICC stated it would examine transactions proposing rail-barge affiliations under the Panama Canal Act consistent with its recently established policies in Ex Parte No. 438, *Acquisitions of Motor Carriers by Railroads*, which makes it easier for railroads to acquire motor carriers unrestricted by the traditional "auxiliary and supplemental" conditions (98). These policies will be examined in the next section.

## B. ICC REGULATION OF RAIL-TRUCK MERGERS

### *Rail-Truck Merger Legislation*

Despite the strong ICC opposition to rail ownership of water carriers in the Lake Line Applications Under Panama Canal Act case in 1915, the ICC concluded several years later in 1928 that railroads should be specifically authorized to engage in motor carriage of both passengers and property either in conjunction with their rail services or as independent line haul providers (99). In 1934, however, ICC Commissioner Eastman testified before a Congressional committee that while railroads should be permitted to use trucks freely in connection with their rail services, he did not advocate the unrestricted use of trucks by railroads. The deteriorating economic condition of the trucking industry undoubtedly explained much of this change of ICC policy (100).

(96) *Ibid*, p. 45.

(97) *Ibid*, p. 3.

(98) *Ibid*, p.14.

(99) See Lake Line Applications Under Panama Canal Act, 33 I.C.C. 699 (1915) and Motor Bus and Motor Truck Operation, 140 I.C.C. 685 (1928).

(100) Michael Erenberg and Bruce M. Kasson, "Railroad-Motor Carrier Intermodal Ownership", *Transportation Law Journal*, Vol. XII, No. 1, 1981, p. 80.

The ICC was granted authority over rail-truck mergers in the Motor Carrier Act of 1935. Railroads (and water carriers and pipelines) were not prohibited from acquiring or merging with a motor carrier but the conditions under which they could acquire motor carriers were established. Section 213 (a) (1) of the Motor Carrier Act of 1935 stated that the ICC could not approve a non-motor carrier-truck merger unless it found that the transaction proposed would promote the public interest by enabling such a non-motor carrier to use truck service to public advantage in its operations and would not unduly restrain competition. It has been argued that Congress passed this provision to prevent rail monopoly over the much smaller motor carrier industry while at the same time permitting railroads to use motor carriage in coordination with their own rail operations (101).

In the Transportation Act of 1940, Section 213 (a) (1) was re-enacted as section 5 (2) (b) of the Interstate Commerce Act. Two important substantive changes were made: (1) restrictions against common ownership were narrowed to apply only to rail ownership of motor carriers, and (2) the language of the new section was liberalized to enable the ICC to grant an acquisition if it found the transactions to be "consistent with the public interest" rather than requiring that the transaction "promote" the public interest (102).

Although neither the Motor Carrier Act of 1980 nor the Staggers Act specifically addressed the issue of rail-truck carrier merger, the ICC has cited both recently to support a more liberal rail-truck merger policy (103). The provisions in both acts stressing competition and intermodal transportation, and the easier entry and less restrictive operating certificates policies of the Motor Carrier Act of 1980 were cited to support these changes (104). Most recently The Transportation Improvement Act of 1983 (Senate Bill 48), which would have, *inter alia*, made it much easier for rails to acquire motor carriers, died in committee.

### *ICC Administration of Rail-Truck Merger Provisions*

Since 1940, ICC decisions with respect to rail-truck acquisitions have been based upon the Congressional policy that rail-truck mergers should be approved only if the ICC finds the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. This language is now found in Section 11344 (c) of the recodified Interstate Commerce Act.

(101) *Ibid*, pp.77-78.

(102) *Ibid*, p. 84.

(103) *Federal Register*, Vol. 49, No. 147, Monday, July 30, 1984 (Policy Statement, in Ex Parte No. 438, (Acquisition of Motor Carriers by Railroads), p. 30376.

(104) G.P. Moates, *op. cit.*, 1984, p. 73.

*ICC Interpretation — Prior to 1980* The small number of rail-motor carrier firms suggests, and others have argued, that rail-truck merger transactions have been limited by Section 11344 (c) as interpreted by the ICC (105). As of 1978, there were only about 19 motor freight carriers controlled by railroads and seven of these arrangements were granted under the "grandfather" provisions in the Motor Carrier Act of 1935 (106).

In its interpretation of this section, with its general language, the ICC held the three words "in its operations" to be restrictive during this time period. This interpretation was manifested in the doctrines the ICC established early on for non-motor carriers to meet in order acquire a motor carrier. These doctrines, "auxiliary and supplemental" and "special circumstances", are not found in the Interstate Commerce Act.

The "auxiliary and supplemental" doctrine was established in the first rail-truck acquisition case. The ICC interpreted the phrase "in its operations" to mean the trucking service had to be auxiliary and supplementary to train service (107). In subsequent cases, the meaning of the phrase "auxiliary and supplementary" was clarified with the limitation clearly on the type of trucking service performed and not solely on the geographical area of operations. In a 1941 case, the ICC enunciated the basic restrictions which were applied to rail-truck mergers until recently.

1. The traffic must be railroad traffic, moving under the railroad's responsibility, under rail billing and rail rates. This restriction does not exclude all-motor movements of such traffic, providing they are not forbidden by a subsequent restriction.
2. The carrier may not serve any point that is not a station on the railroad.
3. Shipments are limited to those received from or delivered to the railroad on a through rail bill of lading covering a prior or subsequent rail haul.
4. "Key point" restriction can be imposed which means that shipments may not be transported by the carrier between any listed major points on the rail line or through or to those points (108).

(105) Clinton Whitehurst, Jr., ed. *Forming Multimodal Transportation Companies*, Washington, D.C.; American Enterprise Institute, 1978, pp. 73 and 79.

(106) *Multimodal Ownership Patterns: Selected Financial and Operating Data*, p. 3. This number could understate the number of rail-truck mergers if the trucking firms acquired by a carrier are subsequently consolidated under one name or are later sold.

(107) Pennsylvania Truck Lines, Inc. — Control — Barker, 1 M.C.C. 101, 1936.

(108) National Transportation Policy Study Commission, "Motor Carrier Entry Control Modification: Railroad Trucking Restrictions and Common Ownership" Working Paper No. 12. The Institute of Urban and Regional Research, the University of Iowa, Iowa City, Iowa, no date, p. 14.

The introduction of piggyback service made these restrictions less effective in keeping rail-affiliated trucking service from encroaching upon the traffic of motor carriers. In response, in the 1960's, the ICC tightened the restrictions by authorizing substituted piggyback service only where one piggyback loading facility replaced several others at which the service was actually being provided and where the new service was being substituted for uneconomical merchandise service (109).

In a series of cases starting in 1936, the ICC developed the doctrine of "special circumstances" which justified granting a rail-truck merger without the usual "auxiliary and supplemental" restriction (110). This doctrine was created to avoid creating certain problems such as the lack of any service whatsoever, rail abandonment, or poor and inefficient service. The applicant first had to show that the proposed transaction would enable the railroad to use motor vehicle service to public advantage in its operations and would not unduly restrain competition, and then demonstrate that conditions to qualify for "special circumstances" existed (111).

*ICC Interpretation — Post 1980* Since the regulatory reform legislation passed in 1980, the ICC has been very active with respect to rail-truck mergers. In policy statements issued in Ex Parte MC-156, *Applications for Motor Carriers Operating Authority by Railroads and Rail Affiliates*, 132 M.C.C. 978 (1982) and Ex Parte 438, *Acquisition of Motor Carriers by Railroads* (1984), the ICC eliminated the "special circumstances" doctrine (112). The ICC characterized the "special circumstances" policy as being a presumptive policy against rail carriers acquiring truck lines and as having a chilling effect on the development of intermodal operations (113). By rejecting the "special circumstances" doctrine, the ICC has implicitly redefined the phrase "in its operations" as meaning the overall transportation operations of the acquiring

(109) *Ibid*, pp. 15-17.

(110) See M. Erenberg and B.M. Kasson, *op. cit.*, p. 89 for a list of ICC cases.

(111) The ICC has found "special circumstances" where (1) the vendee was small and thus not a threat to competition in the territory; (2) the application was unopposed; (3) no other transportation service was available or the particular type of service needed was unavailable; (4) the existing services were inefficient; (5) the area to be served was sparsely populated, or (6) the rights to be acquired duplicate, to a certain extent, rights already held but which are not now restricted, *Ibid*, p. 91.

(112) The ICC early on applied the acquisition restrictions, i.e., the "auxiliary and supplementary" doctrine, to applications for new authority from non-motor carrier applicants. Although there was no expressed restrictions in the statutory language, a literal reading of the language would have led to circumvention of the policy of the proviso in section 11344 (c) if these restrictions were not applied to applications for new authority.

(113) Interstate Commerce Commission, Decision, Ex Parte No. 438, *Acquisition of Motor Carriers by Railroads*, (served July 27, 1984), pp. 1 and 15.



rail carrier. The decision has been appealed to the United States Court of Appeals for the Ninth Circuit (114).

It should be noted that the language in Section 11344 (c), the rail-truck merger provision, was not changed. Opponents (predominantly motor carriers) argued that Congress affirmed the "special circumstances" doctrine by not amending either the National Transportation Policy regarding "to preserve and recognize the inherent advantage of each mode" (which the ICC used in the past to help support the presumptive policy against rail-truck mergers) or Section 11344 (c) (115). The ICC, supported by the rail industry and the U.S. Department of Transportation, argued that the "special circumstances" doctrine was an agency policy "created and transformed by the agency itself", and thus can be modified with changing economic and regulatory environments (116). The ICC based its new policy statement on the change in the relative economic positions of the rail and trucking industries in the United States since 1935 and the new emphasis on competition and intermodalism in the Interstate Commerce Act resulting from amendments added by the Motor Carrier Act of 1980 and the Staggers Act (117). The ICC stated that it no longer thought the best method of preserving the inherent advantages of each mode is through the artificial separation of the modes (118). Finally, the ICC stated that this policy change does not vitiate Section 11344 (c). Railroads seeking to acquire a motor carrier must still meet the requirements embodied in Section 11344 (c). The ICC simply will not routinely impose supplemental and auxiliary conditions upon motor carriers acquired by railroads absent a showing of special circumstances but it rather will decide whether to impose such conditions based upon the facts of each individual case (119).

It is too early to determine the impact of these decisions on the amount of proposed and ICC permitted rail-truck merger transactions. The elimination of the "special circumstances" doctrine has undoubtedly made truck acquisitions by railroads more attractive. Within a month of the ICC decision in Ex Parte 438, the Norfolk Southern applied to the ICC to acquire control of North American Van Lines, Inc. for \$315 million. Recently, the Burlington Northern announced its plan to purchase a group of regional motor carriers (120).

The ICC unanimous decision in April, 1985 approving the Norfolk Southern-North American Van Lines consolidation, the first major rail-truck merger transaction since the ICC decision in Ex Parte No. 438, merits a brief

(114) G.P. Moates, *op. cit.*, 1984, p. 73.

(115) Ex Parte No. 438, p. 8.

(116) *Ibid*, p. 8.

(117) *Ibid*, p. 17.

(118) *Ibid*, p. 14.

(119) *Ibid*, p. 13.

(120) See Patricia Cavanaugh, "BN Planning Network of TL Carriers", *Transport Topics*, May 13, 1985, pp. 1 and 35 and "Burlington Northern Purchase", *Wall Street Journal*, July 8, 1985, p. 9.

review (121). In August of 1984 the application to allow the Norfolk Southern Corporation (Norfolk Southern) to acquire the North American Van Lines trucking operations from Pepsico, Inc. was filed with the ICC. The rail-truck merger involved one of the largest railroads already involved in other modes of transportation and the sixth largest motor carrier firm in the United States (122). The case was considered under Section 11344 (c) and Section 11344 (d), the latter section also being used in the CSX-ACBL merger case discussed above. The ICC noted that Section 11344 (c) is more exacting than Section 11344 (d) and thus should be controlling (123).

The applicants were supported by the U.S. Department of Transportation, a number of shippers and several states. The applicants were opposed by the Teamsters, the United Transportation Union (a rail union), and Regular Common Carrier Conference of the American Trucking Associations. The applicants argued that operating efficiency, new intermodal services and increased competition would result without any anticompetitive effects (124). The major opposition arguments were that it would allow the Norfolk Southern to evade effective rate regulation, reinforce Norfolk Southern's monopoly control at various points, and generate benefits only for the applicants (125).

Several aspects of the ICC decision should be noted. First, the ICC did not back down from its policy established in Ex Parte 438. Based upon its new policy (i.e., the elimination of the "special circumstances" doctrine) and the operating plan filed by the applicants, the ICC concluded that the Norfolk Southern would use the trucking operation to public advantage in its *overall transportation activities* [emphasis added] (126). Second, as in the CSX-ACBL merger case, the ICC relied heavily upon the 1984 DOJ merger guidelines in the analysis of the possible anticompetitive effects (127). Third, in contrast to the CSX-ACBL case, seven commissioners were involved in the decision, including several that are not viewed as strong "deregulationist". Finally, no formal oversight procedures were established as they were in the CSX-ACBL case, suggesting less ICC concern with the anticompetitive effects of the transaction.

#### IV. THE ROLE AND INFLUENCE OF DOJ MERGER GUIDELINES

The recent ICC case decisions and statements of policy for both intra-modal and intermodal mergers among surface freight carriers reveal an increase

(121) Interstate Commerce Commission, Decision, Norfolk Southern Corporation — Control — North American Van Lines, Inc., (Served May 13, 1985).

(122) *Ibid*, Appendix A.

(123) *Ibid*, p. 15.

(124) *Ibid*, p. 9.

(125) *Ibid*, pp. 10-11.

(126) *Ibid*, p. 21.

(127) *Ibid*, pp. 24 and 26.

in the role and influence of the DOJ merger guidelines. Though ICC-approved mergers remain exempt from the federal antitrust laws, the ICC has begun relying more heavily upon the approach and philosophy of the DOJ in its regulation of mergers. The ICC employed the analytical tools and guidelines of the DOJ in recent railroad mergers and in the CSX-ACBL rail-barge case. Additionally, the DOJ routinely investigates such proposed mergers, and its analysis of the potential anticompetitive effects is formally submitted to the ICC for consideration. The ICC by law must weigh the potential anticompetitive and other adverse effects against the potential benefits of a merger in determining whether the merger is consistent with the public interest.

The ICC's class exemption for all trucking mergers poses some interesting scenarios regarding the role of the DOJ. As the ICC has decided to exempt all proposed mergers which generate no opposition on anticompetitive grounds, and has indicated that protesting carriers cannot oppose a merger merely because it injures their financial and operating performance (128), it appears that the only "legitimate" opposition will be that provided by the DOJ or other impartial parties (e.g., the U.S. Department of Transportation). Thus, the extent of the DOJ's role is largely dependent upon the DOJ — how involved does the DOJ want to be? There is also a chance that ICC-exempted trucking mergers may not be viewed as ICC-approved trucking mergers with respect to the exemption from antitrust law (129). If this holds true, trucking mergers would be viewed the same as mergers in nonregulated industries and subjected to DOJ review.

Given the importance of the DOJ in mergers among surface freight transportation companies, the following section provides a review of the DOJ's merger guidelines. Once the guidelines have been discussed, the authors present their views of the likely impacts of these guidelines upon intramodal and intermodal mergers.

#### A. REVIEW OF DOJ MERGER GUIDELINES

On three occasions the DOJ has issued merger guidelines to announce its enforcement policy concerning acquisitions and mergers subject to Section 7 of the Clayton Act and Section 1 of the Sherman Act. The guidelines are

(128) In Ex Parte No. 55 (Sub-No. 57) on page 7 the ICC refers to "meritless" complaints without elaborating on what constitutes such a complaint. However, in Ex Parte No. 55 (Sub-No. 38F) decided four years earlier in 1980 but never officially implemented, the ICC indicated that "a significant responsibility will be placed on protestants to show how the transaction may result in the alleged anticompetitive consequences". Protestants would be expected to show that their ability to continue adequately serving affected markets would be "materially impaired".

(129) *Ibid*, p. 2.

designed primarily to indicate when the DOJ will challenge a merger (130). Although the guidelines may differ substantially from established case law, they affect behavior of merger parties because the high costs of mounting a defense against antitrust prosecution will usually discourage parties from merging if the merger does not fall within the guidelines of the DOJ (131).

The first set of guidelines reflecting the DOJ's enforcement policies of the 1960's was issued in 1968 with the intent to update them periodically to reflect changes in law and in DOJ's enforcement policy. Despite significant changes in the case law and DOJ enforcement policy in the 1970's new guidelines were not issued until 1982 (132). It has been argued that the Reagan Administration, using the merger policy outlined in the 1982 guidelines, will not seek to block any of the large mergers currently pending (133). The 1982 guidelines differed from the 1968 guidelines in terms of both policy on enforcement and concepts and measures used to analyze a merger. In contrast to the 1968 guidelines, 1982 guidelines are generally hospitable to mergers. The 1982 guidelines are based upon the assumption that most mergers are efficiency-producing and most government intervention is inefficient. The new guidelines consider only the extent to which the particular merger creates or enhances market power, which is defined as the ability to price profitably above costs for a significant period of time. The 1968 guidelines focused on preserving and promoting market structures conducive to competition. Examples of differences between the two sets of guidelines are: (1) the 1982 guidelines used the Herfindahl-Hirschman Index (HHI) as a measure of concentration while the 1968 guidelines employed the four-firm concentration ratio; (2) the 1982 guidelines recognized foreign competition, the 1968 guidelines did not; (3) unlike the 1968 guidelines, the 1982 guidelines contained non-market share factors (e.g., ease of entry) that may indicate that no challenge should be made despite a finding based upon the concentration criteria that would normally trigger a challenge; and (4) under the 1982 guidelines, vertical mergers were usually viewed as efficiency-producing while under the 1968 guidelines they were perceived to be almost always unnecessary to realize efficiencies. The DOJ's establishment and use of these new concepts and measures were pro-merger (134).

In June of 1984, the DOJ issued its third set of merger guidelines. These new guidelines, although modifying the language of the 1982 guidelines,

(130) U.S. Department of Justice, Merger Guidelines, June 14, 1984, p. 2.

(131) Peter Bronsteen, "A Review of the Revised Merger Guidelines", *The Antitrust Bulletin*, Winter 1984, p. 614.

(132) U.S. Department of Justice, p. 1.

(133) Robert E. Taylor and Andy Pasztor, "Antitrust Officials Unlikely to Challenge Pending Mergers During Reagan's Term", *Wall Street Journal*, Vol. LXV, June 28, 1985, p. 2.

(134) See Eleanor M. Fox, "The New Merger Guidelines — a blueprint for micro-economic analysis", *The Antitrust Bulletin*, Fall 1982, pp. 552-563 for a discussion of these differences.

do not represent a different enforcement policy (135). It has been argued that the 1984 guidelines simply clarify certain concepts in the 1982 guidelines and explain how the DOJ has applied the 1982 guidelines (136). Although numerous minor changes were made to the 1982 guidelines, three changes are particularly important. First, the discussion of market concentration ratios, the HHI thresholds, was modified to clarify that the DOJ will not challenge mergers solely on the basis of HHI criteria. Second, the 1984 guidelines spelled out more thoroughly how foreign competition would be accounted for in defining the market and measuring market concentration. Third, the 1984 guidelines modified the language in the 1982 guidelines to clearly indicate that the DOJ does not ignore efficiency claims and to identify the types of efficiencies that will normally be considered (economies of scale, better integration of production facilities, plant specialization, and lower transportation costs) (137).

The review of the three sets of guidelines indicate that the DOJ currently has a much more pro-merger enforcement policy than it did in 1968. In addition, the DOJ has subordinated court-made legal antitrust rules to economic analysis, which has been argued to have been used by the DOJ to avoid intervening in mergers (138). The pro-merger stance of the ICC in recent intra- and intermodal merger cases and the ICC's reliance on economic analysis in merger cases and less reliance on legal precedent are consistent with the position of the primary U.S. merger antitrust enforcement agency — the DOJ. It is difficult to separate the pro-merger influences of the recent deregulation policies specific to the transportation sector from the pro-merger policies of the DOJ that apply to all other sectors of the economy.

#### B. APPLICABILITY AND IMPACT OF DOJ MERGER GUIDELINES

As noted above, the ICC has employed to some degree the current DOJ merger guidelines in several recent mergers. The steps under the DOJ merger guidelines for ascertaining whether a merger will increase market power, the new focus on merger policy, are the following: (1) define the relevant market; (2) measure the concentration before and after the proposed merger; and, (3) for those acquisitions that do not fall safely within the harbors established by the guidelines, examine other factors to help interpret the market concentration findings (139). Under the merger guidelines, the relevant market has two dimensions: product and geographic (140). In the context of transportation

(135) William French Smith, U.S. Attorney General, press release, mimeo, June 14, pp. 2-3.

(136) P. Bronsteen, *op. cit.*, p. 650.

(137) U.S. Department of Justice, Statement Accompanying Release of Revised Merger Guidelines, June 14, 1984, pp. 8-17.

(138) R.E. Taylor and A. Pasztor, *op. cit.*, p. 2.

(139) P. Bronsteen, *op. cit.*, pp. 616-625.

(140) *Ibid.*, pp. 616-620.

mergers, the product dimension requires decisions with respect to inclusion of private carriage, other modes, and whether the transportation of different major commodity groups constitute separate markets. For transportation mergers, the questions concerning the geographic dimension of markets include what is the appropriate size of area (e.g., region, nation) and if (and which) individual routes (e.g., river segments, city-pairs) should be considered. Both demand substitution and supply substitution are considered by the DOJ in identifying the relevant market (141).

The DOJ merger guidelines employ the Herfindahl-Hirschman Index (HHI) to measure market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms included in the relevant market and is thus sensitive to both the relative size and number of firms in the market (142). The merger guidelines note that a horizontal merger with a postmerger HHI of less than a 1000 will not be challenged except in extraordinary circumstances. In cases where the postmerger HHI is between 1000 and 1800, the DOJ is unlikely to challenge mergers that increase the HHI by less than 100, and is likely to challenge mergers that increase mergers by more than 100. In acquisitions where the postmerger HHI is above 1800, and thus considered to be highly concentrated, the DOJ will be unlikely to challenge if the merger increased the HHI by less than 50 points, likely to challenge if the HHI is increased by more than 50 but less than 100, and will challenge except in extraordinary circumstances if the HHI is increased by more than 100 (143).

For those mergers that are likely to be challenged based upon the postmerger HHI, the analysis of other factors will take place. The "other factors" most relevant to transportation mergers are ease of entry (likelihood and probable magnitude of entry which would occur within two years in response to a small but significant increase in price), and factors that relate to the ease and profitability of collusion (e.g., product homogeneity, capacity of fringe firms), current market conduct and performance by firms in the industry and economic efficiencies (144).

The current DOJ merger guidelines identify only three cases in which the DOJ may challenge a vertical merger (e.g., an "end-to-end" railroad merger) (145). First, vertical mergers that create objectionable barriers to entry may be challenged. Before this "barrier to entry" condition will trigger a challenge, however, three necessary (but not sufficient) conditions must be met: (1) the merger must force entrants to enter at both levels (e.g., all new entrants would have to enter as an integrated rail-barge firm); (2) this required simulta-

(141) *Ibid.*, p. 616.

(142) *Ibid.*, p. 620.

(143) *Ibid.*, pp. 620-626.

(144) *Ibid.*, pp. 624-626.

(145) See E.M. Fox, *op. cit.*, pp. 543-547 for a more detailed discussion of the application of the merger guidelines with respect to vertical mergers.

neous entry to both markets (e.g., rail and barge markets) is substantially more difficult than entry into a single market; and (3) the concentration in the market in which the competitive concerns are being considered are relatively high (above 1800 HHI). The DOJ may also challenge vertical mergers which facilitate collusion in the upstream market (e.g., the rail market in a normal rail-barge movement) by vertically integrating into the retail markets and/or eliminate a particularly disruptive buyer in a downstream market. The DOJ is unlikely to challenge a vertical merger on this "collusion" ground in the first case unless a HHI of 1800 is found in the upstream market, and a large percentage of the upstream product would be sold through vertically-integrated outlets after the merger. In the second case (i.e., elimination of the disruptive buyer), the DOJ is unlikely to challenge unless a HHI of 1800 is found in the upstream market and the eliminated disruptive firm differed substantially from the other firms in the market. In addition, the DOJ will consider challenging vertical mergers that create substantial opportunities for evasion of rate regulation (e.g., railroad rate regulation by the ICC).

A review of the above DOJ merger guidelines and the ICC application of them in recent merger cases strongly suggests that, in the absence of ICC merger regulation, no rail-barge, rail-truck, or trucking mergers would be challenged by the DOJ. With respect to horizontal mergers, the use of a narrowly defined relevant market may produce HHI findings that would trigger a DOJ challenge. This use of a narrowly defined relevant market, however would probably insure a finding that easy entry (from firms serving other routes or carrying other commodities) would prevent the merged firm from gaining any market power and thus the merger would not be challenged. The use of regional or national markets as the relevant market, on the other hand, though reducing the value of the ease-of-entry argument, would not produce HHI numbers that exceed DOJ thresholds (146). Thus, primarily because of the ease of entry characteristic of the barge and trucking industries, rail-barge, rail-truck and trucking horizontal mergers would very likely not be challenged by the DOJ. Because the cases in which the DOJ would challenge a vertical merger have been observed to be relatively rare, it is unlikely that any proposed rail-barge, rail-truck or trucking mergers would be challenged under the vertical merger guidelines (147).

Conversely the parallel or horizontal aspects of many railroad mergers, in the absence of ICC merger regulation, would likely encounter opposition from the DOJ. A narrow definition of relevant markets would almost certainly place many rail markets in the highly concentrated market classification as measured by the DOJ's HHI criteria. Unlike mergers involving trucking firms and barge lines, intramodal rail mergers would find no escape from DOJ opposition through the ease-of-entry argument.

(146) See D. Breen, *op. cit.*, pp. 8-9 for a discussion of how proposed trucking mergers would fare under the current DOJ merger guidelines.

(147) E.M. Fox, *op. cit.*, p. 544.

Similarly, though more difficult to measure, the DOJ would likely scrutinize the end-to-end or vertical aspects of proposed rail mergers closely. Many rail markets have a HHI value above 1800 and would, thus, attract DOJ concern.

The DOJ's position in the Union Pacific-Missouri Pacific-Western Pacific merger, a mostly end-to-end merger approved by the ICC in 1982, supports the above contentions. First, the DOJ adopted a narrow definition of the relevant market in this case. The product market was confined to rail transportation as intermodal competition was judged not to be effective. The relevant geographic markets were origin and destination county pairs (148). As a result, the DOJ found competitive harm likely to occur in those markets where the merger applicants operated parallel routes. Second, though the DOJ did not perform traffic diversion studies to assess the likely competitive harm resulting from the end-to-end aspects of the merger, the DOJ did express its views on the potential anticompetitive effects of such integration and urged the ICC to proceed cautiously in analyzing foreclosure arguments (149). The ICC summarized the DOJ's concerns in its decision on this merger:

"DOJ notes that while end-to-end mergers involve railroads which do not compete between the same origins and destinations, such mergers can still produce competitive harms. First, source competition at common points can be adversely affected. Second, such a merger can act to reduce competition between the merged firm and other railroads. DOJ states that this can occur because a railroad which is the sole carrier on one portion of a movement might have the ability to eliminate competition between its merger partner and other potential interline carriers for the other part of the haul. DOJ states that, in addition to the direct anticompetitive impact, such market power diversions may lead to reduced ability on the part of carriers suffering such diversions to competitively discipline the rates and service levels offered by the consolidated system (150) "

In conclusion, the authors believe that the ICC's greater reliance upon the DOJ merger guidelines will not affect the ICC's general permissive attitude toward surface freight transportation mergers. As noted, trucking and intermodal mergers would not likely be challenged under these guidelines. Though many rail mergers would likely produce significant anticompetitive effects in select markets, the ICC's imposition of protective traffic conditions to alleviate these effects will probably continue in order to permit the attainment of merger benefits. The forthcoming decision in the proposed Southern Pacific-Santa Fe merger, a primarily parallel merger, will provide a strong test for this postulation.

(148) Finance Docket No. 30000, pp. 674-676.

(149) *Ibid*, p. 677.

(150) *Ibid*, p. 676.